No. 07-138

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In The
Supreme Court of the United States

MICROSOFT CORPORATION,

Petitioner,

v.

JAMES ODOM et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DANIEL C. GIRARD
Counsel of Record
AARON M. SHEANIN
AMANDA M. STEINER
GIRARD GIBBS LLP
601 California St., 14th Fl.
San Francisco, CA 94108
Telephone: (415) 981-4800

ANTHONY K. LEE
Attorney at Law
580 California St., 16th Fl.
San Francisco, CA 94104
Telephone: (415) 439-4862

BETH E. TERRELL
TOBY J. MARSHALL
TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Ave., Suite 2200
Seattle, WA 98101
Telephone: (206) 682-5600

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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SUMMARY OF ARGUMENT

Microsoft's petition should be denied. True, there is a circuit split on the degree of structure required for an association-in-fact RICO enterprise. The split has already existed for over twenty years, however, apparently with few ill effects – too few, in any case, to warrant resolution by this Court. Furthermore, even if the Court were inclined to decide the matter now, this case is far from an ideal vehicle for the purpose. A holding that the Ninth Circuit erred – and that an association-in-fact enterprise must have a structure beyond that necessary for the predicate racketeering activity – would not end the litigation, as Respondents plead, or could readily amend their complaint to plead, a separate structure.

At any rate, the Ninth Circuit holding is correct. This Court's opinion in *United States v. Turkette*, 452 U.S. 576 (1981), sets forth the elements of an association-in-fact enterprise: a common purpose; an ongoing organization; and the functioning of the associated persons as a continuing unit. *Turkette* leaves no room for a "separate structure" requirement. Qualifying or abandoning *Turkette* will not solve the problem: nothing in RICO suggests an association-in-fact enterprise must have a "separate structure." And requiring such a structure would yield the perverse result that informally structured criminal enterprises would be excluded.

Lacking persuasive legal arguments, Microsoft argues policy: American business will suffer unless this Court imports a separate-structure requirement into the definition of an association-in-fact RICO enterprise. Setting aside the interpretive problems with Microsoft's argument, narrowing the range of enterprises which qualify will not

deter civil RICO litigation, as most corporate association-in-fact enterprises (including the $200 million joint venture at issue in this appeal) would satisfy the separate-structure requirement.

Microsoft also presents no compelling reason to decide whether a group of corporations can constitute an association-in-fact enterprise. There is no inter-circuit conflict on the matter. All ten circuits that have considered the question have answered it in the affirmative. Furthermore, the issue was before this Court only two terms ago, in *Mohawk Industries, Inc. v. Williams*, No. 05-465 (argued April 26, 2006). The parties in that case briefed the question thoroughly and discussed it extensively at oral argument. The Court nevertheless declined to decide the issue. Microsoft fails to show why it should do so now.

REASONS FOR DENYING THE PETITION

I. MICROSOFT PRESENTS NO COMPELLING REASON WHY THIS COURT SHOULD REVIEW THE NINTH CIRCUIT'S HOLDING ON THE CRITERIA FOR AN ASSOCIATION-IN-FACT ENTERPRISE.

A. Microsoft Fails To Show Why A Circuit Split That Has Existed For Over Two Decades Need Be Resolved Now.

Microsoft asserts the Court should review the judgment below simply because the Ninth Circuit's holding represents one side of a circuit split on whether an association-in-fact enterprise requires an ascertainable structure beyond that necessary to carry out the predicate acts of racketeering. While the Court may grant certiorari

to resolve an inter-circuit conflict, Microsoft has presented no compelling reason why the Court should do so here.

In the Ninth Circuit's view, there is now a four-four-one split on the issue among the courts of appeals, with the Third, Fourth, Eighth, and Tenth Circuits requiring an ascertainable structure beyond that needed for the racketeering activity; the First, Second, Ninth, Eleventh, and District of Columbia Circuits requiring no ascertainable structure of any kind; and the Seventh requiring some sort of structure, although not necessarily one with an existence beyond that needed for the predicate acts. (*See* Pet. Cert., App. at 14a-16a.) By Microsoft's reckoning, there is a seven-four split, with the Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits requiring an ascertainable structure beyond that needed for the predicate acts, and the First, Second, Ninth, and Eleventh requiring none. (*See* Pet. Cert. at 9 & n.3.)

Microsoft's count is incorrect. Notwithstanding Petitioner's assertions, the Ninth Circuit correctly interpreted *United States v. Perholtz*, 842 F.2d 343 (D.C. Cir.), *cert. denied*, 488 U.S. 821 (1988), and appropriately included the D.C. Circuit as not requiring an ascertainable structure.[1] Furthermore, the Sixth and Seventh Circuits seem to require a structure only in the sense that the enterprise must have continuity through time, have unity of purpose,

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[1] *See Perholtz*, 842 F.2d at 364 (approving jury instruction stating, "'*It is not necessary that the enterprise*, if it existed, *have any particular or formal structure* but it must have sufficient organization that its members function and operated [sic] together in a coordinated manner in order to carry out the common purpose alleged.'") (emphasis added).

and be organized so as to enable hierarchical or consensual decision-making.[2]

In the final analysis, though, the precise score is irrelevant. The most important fact is that the circuit split has already existed in one form or another for over twenty years.[3] During this time, it seems to have posed no undue problem for courts, litigants, or the development of the law – at any rate, not enough to warrant resolution by this Court.[4] Microsoft fails to explain why the Court, having

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[2] *See Richmond v. Nationwide Cassel L.P.*, 52 F.3d 640, 644 (7th Cir. 1995) ("A RICO enterprise is an ongoing 'structure' of persons associated through time, joined in purpose, and organized in a manner amenable to hierarchical or consensual decision-making.") (internal quotation marks omitted); *see also United States v. Olson*, 450 F.3d 655, 664 (7th Cir. 2006) ("We have held that in informal organizations such as criminal groups, there 'must be some structure, to distinguish an enterprise from a mere conspiracy, but there need not be much.' "); *United States v. Rogers*, 89 F.3d 1326, 1337 (7th Cir. 1996) ("The continuity of an informal enterprise and the differentiation among roles can provide the requisite 'structure' to prove the element of 'enterprise.' "), *cited with approval in United States v. Johnson*, 440 F.3d 832, 840 (6th Cir.), *cert. denied*, 127 S. Ct. 48 (2006).

[3] *Compare, e.g., United States v. Weinstein*, 762 F.2d 1522, 1537 n.13 (11th Cir.) ("The appellants in *Hewes* argued that . . . a RICO enterprise must possess an 'ascertainable structure' distinct from the associations necessary to conduct the pattern of racketeering activity. . . . Our cases have repeatedly rejected this contention and we reiterate that rejection here."), *modified, reh'g denied in part*, 778 F.2d 673 (11th Cir. 1985), *cert. denied*, 475 U.S. 1110 (1986), *with United States v. Riccobene*, 709 F.2d 214, 223-24 (3d Cir.) ("[I]t is not necessary to show that the enterprise has some function wholly unrelated to the racketeering activity, but rather that it has an existence beyond that which is necessary merely to commit each of the acts charged as predicate racketeering offenses."), *cert. denied*, 464 U.S. 849 (1983).

[4] Indeed, to some extent, the circuit split is one of semantics. The "structure" that seems necessary in the Sixth and Seventh Circuits is little different from the showing now required for an association-in-fact

(Continued on following page)

refrained from deciding the matter for the past twenty years, should do so now. For instance, Microsoft cannot claim the Ninth Circuit's holding adds a new voice to the debate, as with its opinion the Court of Appeals merely switched sides, expressly overruling previous decisions stating that a separate ascertainable structure *was* required for an association-in-fact enterprise. (*See* Pet. Cert., App. at 17a.)

Furthermore, no weight should be given to Microsoft's suggestion that RICO plaintiffs will have a field day with the Ninth Circuit's decision. (*See* Pet. Cert. at 5, 18 & n.5.) As an initial matter, this Court disposed of similar concerns long ago in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985):

> Underlying the Court of Appeals' holding was its distress at the "extraordinary, if not outrageous," uses to which civil RICO has been put. Instead of being used against mobsters and organized criminals, it has become a tool for everyday fraud cases brought against "respected and legitimate 'enterprises.'" Yet Congress wanted to reach both "legitimate" and "illegitimate" enterprises. The former enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences. . . .
>
> It is true that private civil actions under the statute are being brought almost solely against

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enterprise in the Ninth Circuit – a common purpose for which the association has formed; an ongoing organization; and the functioning of the associated persons as a continuing unit – which in turn is based on a straightforward application of *United States v. Turkette*, 452 U.S. 576 (1981). (*See* Pet. Cert., App. at 18a-20a.)

> such defendants, rather than against the archetypal, intimidating mobster. Yet this defect – if defect it is – is inherent in the statute as written, and its correction must lie with Congress.

Id. at 499 (citations and footnote omitted). It is telling that in the two decades since the *Sedima* decision, Congress has added no restrictions on the types of entities that may be sued under RICO.

As discussed above, the circuit split on the separate-structure requirement has already existed for over twenty years. Microsoft offers no evidence that the circuits declining to require a separate structure have become magnet jurisdictions for civil RICO litigation. Despite its heavy complex-litigation docket, the Second Circuit did not become a mecca for RICO plaintiffs when it rejected the separate-structure requirement a quarter-century ago, *see, e.g., United States v. Mazzei*, 700 F.2d 85, 88 (2d Cir.) (rejecting defendant's argument that "to establish a violation of RICO, there must be proof that the alleged enterprise was distinct from the alleged pattern of racketeering activity"), *cert. denied*, 461 U.S. 945 (1983). There is no reason to believe the Ninth Circuit's experience will be any different. Microsoft's histrionics furnish no basis on which to grant a writ of certiorari.

B. Review Of The Ninth Circuit's Judgment Would Have Little Effect On The Proceedings Below.

In addition, this case presents a poor opportunity for the Court to clarify the ascertainable-structure issue. Even if this Court were to grant certiorari, and even if it were to hold that the Ninth Circuit erred and a separate

ascertainable structure is required for an association-in-fact enterprise, the holding would have little effect on the case after remand. Respondents will simply argue below that the Microsoft-Best Buy enterprise as currently alleged does have an ascertainable structure with an existence beyond that strictly necessary for the predicate acts – as indeed they previously did. In fact, Respondents never volunteered that an ascertainable structure should not be required, as the governing precedent at the time was *Chang v. Chen*, 80 F.3d 1293 (9th Cir. 1996), which held "a RICO enterprise must have an ascertainable structure separate and apart from the structure inherent in the conduct of the pattern of racketeering activity," *id.* at 1295. Thus, Respondents explained that the Microsoft-Best Buy joint marketing enterprise had a separate existence, because it would still have existed even if the unauthorized MSN account registrations had not occurred. *See United States v. Lemm*, 680 F.2d 1193, 1201 (8th Cir. 1982) (holding that evidence was sufficient to show separate structure required by Eighth Circuit) ("The arson ring, through hand-delivery of insurance claims, could have conducted its activities without any predicate acts of mail fraud. In other words, if we eliminate for purposes of argument the predicate acts of mail fraud, the evidence still shows an on-going structure which engaged in legitimate purchases and repairs of property as well as acts of arson."), *cert. denied*, 459 U.S. 1110 (1983); *Hastings v. Fidelity Mortgage Decisions Corp.*, 984 F. Supp. 600, 610 (N.D. Ill. 1997) (decision by district court in Third Circuit, which requires separate ascertainable structure) ("The association exists separate and apart from the pattern of racketeering activity alleged in the Complaint, since Fidelity would require the services provided by mortgage brokers such as Superior even if it did not participate in

schemes designed to artificially inflate the interest rates charged to borrowers.").

If the Ninth Circuit nevertheless disagreed with Respondents about the sufficiency of their complaint in light of this Court's hypothetical holding, Respondents would amend their complaint, as even those judges who found the complaint inadequate in the en banc opinion here believed Respondents were entitled to do. (*See* Pet. Cert., App. at 24a-27a.) At this point, there is little doubt Respondents could adequately amend their complaint with respect to the details of the enterprise. After the District Court dismissed Respondents' RICO claims with prejudice as insufficiently alleged, Respondents, at the District Court's suggestion, re-filed their state-law claims in the Washington Superior Court for King County. A substantial amount of discovery has been taken in the state-court action, and a nationwide plaintiff class has been certified. Respondents can, among other things, name individual personnel from Microsoft and Best Buy who were responsible for MSN account registrations and describe how the companies managed their marketing alliance, including citing and quoting from a document governing the joint steering committee established for that purpose.

Therefore, if for the sake of clarity, the Court wishes to decide the ascertainable-structure question in a case where the holding will be immediately outcome-determinative (assuming it has any inclination to decide the issue at all), the present case is ill-suited for that purpose.

C. At Any Rate, The Ninth Circuit's Holding Is Correctly Based On A Straightforward Application Of *Turkette*.

Similarly, if the Court wishes to decide the ascertainable-structure issue in a way that achieves maximum clarity, the goal would be better served by holding that a court of appeals erred in its view of the matter – which is not the case here. The Ninth Circuit based its holding on the plain language of *United States v. Turkette*, 452 U.S. 576 (1981), which described the characteristics of an associated-in-fact enterprise thus:

> The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise.

Id. at 583 (citation omitted). Nowhere in *Turkette* did the Court mention the need to establish any sort of separate ascertainable structure to the enterprise. A common purpose; an ongoing organization; and the functioning of the associated persons as a continuing unit – these are the elements of an association-in-fact enterprise set forth in *Turkette*. The additional separate-structure requirement imposed by several circuits finds no support in the Court's language. Microsoft contends a separate-structure requirement is necessary to distinguish an enterprise from a mere conspiracy. (*See* Pet. Cert. at 14-15.) That argument,

however, simply ignores the elements of an enterprise described in *Turkette*. If all elements are present, a RICO enterprise exists. If they are not, then one has a mere conspiracy or something else short of a RICO enterprise. As the D.C. Circuit explained in *Perholtz*, 842 F.2d 343:

> Those courts imposing a strict separateness requirement appear to be concerned that RICO could be expanded to encompass even a "sporadic and temporary criminal alliance." They need not be, however, if proper attention is given to the organization and continuity requirements for the enterprise, on the one hand, and the "continuity plus relationship" requirement for the pattern of racketeering, on the other hand.

Id. at 363 (citation omitted).[5]

In fact, a separate-structure requirement tends to thwart, rather than further, the purposes of RICO. As this Court held in *Turkette*, RICO reaches purely criminal enterprises as well as legitimate ones. *See* 452 U.S. at 578. To the extent a separate-structure element is construed to require an organization engaging in both legitimate

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[5] Thus, contrary to Microsoft's mischaracterization, a simple conspiracy is *not* enough to constitute an enterprise in those circuits without an ascertainable-structure requirement. (*See* Pet. Cert. at 13.) The *Turkette* elements must still be established. *See, e.g.*, Pet. Cert., App. at 18a ("The Supreme Court in *Turkette* articulated the criteria for an associated-in-fact enterprise under RICO. . . . We consider these criteria in turn."); *United States v. Cianci*, 378 F.3d 71, 82 (1st Cir. 2004) ("This circuit has cast its lot with courts that have declined to make *Bledsoe*'s 'ascertainable structure' criterion a mandatory component of a district court's jury instructions explaining RICO associated-in-fact enterprises. Instead, we have approved instructions based strictly on *Turkette*'s explanation of how a criminal association might qualify as a RICO enterprise.") (citation omitted).

business activity and predicate acts of racketeering, the *Turkette* holding is flouted. Moreover, even with respect to purely criminal enterprises, it is inappropriate to require an ascertainable structure with an existence beyond that necessary to perform the predicate acts. As the Second Circuit stated in *Mazzei*, 700 F.2d 85, such a requirement "would lead to the anomalous result that a large scale underworld operation which engaged solely in trafficking of heroin would not be subject to RICO's enhanced sanctions, whereas small-time criminals jointly engaged in infrequent sales of contraband drugs and illegal handguns arguably could be prosecuted under RICO." *Id.* at 89.

Accordingly, far from erring, the Ninth Circuit followed *Turkette* and remained faithful to congressional intent by rejecting a separate-structure requirement.

II. MICROSOFT PRESENTS NO COMPELLING REASON WHY THIS COURT SHOULD REVISIT WHETHER AN ASSOCIATION-IN-FACT ENTERPRISE CAN CONSIST OF A GROUP OF CORPORATIONS.

If anything, there is even less merit to Microsoft's request for a writ of certiorari to decide whether a group of corporations can constitute an association-in-fact enterprise. (*See* Pet. Cert. at 18-22.) Contrary to Microsoft's interpretation, the Court's consideration of the issue only two terms ago in *Mohawk Industries, Inc. v. Williams*, No. 05-465 (argued April 26, 2006), is reason to deny Microsoft's petition, not grant it. In *Mohawk*, the Court reviewed a ruling of the Eleventh Circuit, reported at *Williams v. Mohawk Industries, Inc.*, 411 F.3d 1252 (11th Cir. 2005), affirming denial of a motion to dismiss RICO

claims predicated on an alleged enterprise consisting of the corporation Mohawk Industries and third-party labor recruiters. As Microsoft observes, the transcript of oral argument shows that much, if not most, of the argument was devoted to the question of whether an association-in-fact enterprise can include or consist of corporations. Furthermore, a review of the briefs on the merits shows the issue was thoroughly discussed by the parties in writing. In addition, a decision on the question in the negative would have been outcome-determinative. As petitioner's counsel Carter Phillips, Esq., observed, although the sole question on which certification had been granted was different (whether a defendant corporation and its agents engaged in arm's-length dealings can constitute an enterprise):

> We – we think it is fairly subsumed within the question presented, and we also think it would be an – an utterly artificial exercise to try to analyze what is an association-in-fact enterprise without first deciding whether or not a corporation could be included in the first instance because, as Justice Scalia says, if they can't, then it seems to me this is a substantially easier question, and also it is an extraordinarily important one.

Tr. Oral Arg. at 8-9.

Nevertheless, despite having an opportunity to decide the question on a full record, the Court declined to do so; vacated the judgment of the Eleventh Circuit; and directed the court of appeals to consider the case further in light of *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991 (2006), which addresses the need to conduct a proximate-cause inquiry into alleged RICO injuries. *See Mohawk Indus. v.*

Williams, 126 S. Ct. 2016 (2006). On remand, the Eleventh Circuit reinstated its ruling affirming denial of Mohawk's motion to dismiss the RICO claims. *See Williams v. Mohawk Indus.*, 465 F.3d 1277 (11th Cir. 2006), *cert. denied*, 127 S. Ct. 1381 (2007). Respondents submit that this Court's actions reflect an inclination to leave undisturbed the unanimous conclusion of the ten circuits that have considered the matter – that a group of corporations can constitute an association-in-fact enterprise. Microsoft's petition for a writ of certiorari adds nothing new to the extensive dialogue that was conducted in *Mohawk*, and should be denied.

That unanimous conclusion is also correct on the merits. As thoroughly discussed by the respondent and the United States as amicus curiae in *Mohawk*, 18 U.S.C. § 1961(4) says "'enterprise' *includes* any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity. . . ." (Emphasis added.) The use of "includes" means the referenced list of things that can constitute an enterprise is not exhaustive. Furthermore, 18 U.S.C. § 1962(c) says:

> It shall be unlawful for any *person* employed by or *associated with* any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(Emphasis added.) Section 1962(c) speaks of "persons," not "individuals." 18 U.S.C. § 1961(3) defines "person" to "include[] any individual or entity capable of holding a legal or beneficial interest in property." Therefore, Congress

necessarily contemplated that non-natural persons, e.g., corporations, could be liable as part of an association-in-fact enterprise.

To argue, as Microsoft does, that an association-in-fact enterprise must consist exclusively of individuals and cannot include any corporation or other non-natural person is to propose a truly radical limitation of RICO. As the D.C. Circuit observed in *Perholtz*, 842 F.2d 343, in rejecting a similar argument:

> Appellants' reading of section 1961(4) would lead to the bizarre result that only criminals who failed to form corporate shells to aid their illicit schemes could be reached by RICO. This interpretation hardly accords with Congress' remedial purposes: to design RICO as a weapon against the sophisticated racketeer as well as (and perhaps more than) the artless.

Id. at 353.

Microsoft concludes by renewing its policy argument that RICO must be judicially limited to protect American business. (*See* Pet. Cert. at 20-21.) This holding, however, dates back twenty years or more among the various courts of appeals. (*See* Pet. Cert. at 20-21 (collecting cases).) During that time, the American business landscape has not been devastated or even significantly affected by RICO litigation, nor has Congress seen fit to "correct" the holding through legislation. Microsoft's alarmist predictions have thus already been proven false, and are no reason to grant its petition.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

September 5, 2007

Respectfully submitted,

DANIEL C. GIRARD
Counsel of Record
AARON M. SHEANIN
AMANDA M. STEINER
GIRARD GIBBS LLP
601 California Street, 14th Floor
San Francisco, California 94108
Telephone: (415) 981-4800
Facsimile: (415) 981-4846

ANTHONY K. LEE
Attorney at Law
580 California Street, 16th Floor
San Francisco, California 94104
Telephone: (415) 439-4862
Facsimile: (415) 439-4962

BETH E. TERRELL
TOBY J. MARSHALL
TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
Telephone: (206) 682-5600
Facsimile: (206) 682-2992

Counsel for Respondents